

LFC Requester:	Vanessa Hawker
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**AGENCY BILL ANALYSIS
2019 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date 2/18/19
Bill No: HB133hfla

Sponsor:	<u>Rep. Elizabeth "Liz" Thomson</u>	Agency Name and Code Number:	<u>PED-924</u>
Short Title:	<u>SCHOOL SEXUAL ACTIVITY CONSENT STANDARDS</u>	Person Writing	<u>Daniel Manzano</u>
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		
NFI	NFI	Nonrecurring	General

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
NFI	NFI	NFI	Nonrecurring	N/A

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI	NFI	Nonrecurring	N/A

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: Amendment to HB133
Duplicates/Relates to Appropriation in the General Appropriation Act: None as of 2/13/2019

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis HB133hfla:

House Bill 133 House Floor Amendment 1 (HB133hfla) requires that, to the extent feasible, post-secondary institutions and public schools provide assistance or services to not only the accused, but also the accuser.

HB133hfla amends Section 22-13-1.1 NMSA 1978 to remove the requirement that school districts submit a health education implementation plan to the Public Education Department (PED).

HB133hfla designates the first cohort of students (seventh graders in the 2019-2020 school year) who will be required to receive the affirmative consent standard in health education courses as required by HB133.

Synopsis HB133:

House Bill 133 (HB133) requires a public or private post-secondary educational institution that receives state funds for student financial assistance to adopt policies addressing affirmative consent and prevention of sexual assault, domestic violence, dating violence and stalking. HB133 creates a new section of Chapter 22, Article 2 New Mexico Statutes Annotated (NMSA) 1978 requiring the Public Education Department (PED) to adopt sexual assault, domestic violence, dating violence, and harassment or stalking policies and procedures. In addition, HB133 amends Section 22-13-1.1 NMSA 1978 requiring health education graduation requirement courses to include affirmative consent in the current age-appropriate prevention and awareness of sexual abuse and assault training.

FISCAL IMPLICATIONS

Fiscal Implications HB133hfla:

HB133hfla has no fiscal implications for the PED other than those associated with HB133.

Fiscal Implications HB133:

HB 133 requires the PED to adopt policies and procedures to address allegations of sexual assault, domestic violence, dating violence and harassment or stalking involving a student, staff member, volunteer or contractor both on and off campus. The framing of this policy would require collaboration with the Children Youth and Families Department (CYFD), New Mexico State Police, the Office of the Attorney General (OAG) and other agencies. HB133 also requires provision of a comprehensive, trauma-informed training program for school officials involved in

the investigating and adjudicating of sexual assault, domestic violence, dating violence and harassment or stalking cases. The PED would need to monitor implementation of the adopted policies, as well as the training program for school officials. HB133 allocates no funds for the development of policies and procedures, the administration of the policy or for training programs.

HB133 amends the PED Primary and Secondary Education Standards for Excellence <http://www.nmcpr.state.nm.us/uploads/nmac/06/06.029.0001.pdf> health education graduation requirement course to include affirmative consent in the current requirement of age-appropriate prevention and awareness of sexual abuse and assault training. The PED would have to amend New Mexico Administrative Code (NMAC) as well as the course description in the Student Teacher Accountability Reporting System (STARS) to incorporate the affirmative consent requirement in the health education class. HB133 allocates no funds for the administration of these duties. This can be accomplished with existing staff and resources.

SIGNIFICANT ISSUES

Significant Issues HB133hfla:

In designating students entering the seventh grade in the 2019-2020 school year as the first cohort of students required to be taught the standard of affirmative consent in the health education course, HB133hfla provides schools that do not teach the graduation required health education course in the seventh grade with additional time to transition to curriculum including the affirmative consent standard.

HB 133hfla continues to require that a public or private post-secondary educational institution that receives state funds for student financial assistance adopt detailed, complainant-centered policies and procedures for the investigation of and disciplinary procedures addressing allegations of sexual assault, domestic violence, dating violence and harassment or stalking involving a student, faculty member, employee, contractor or regent both on and off campus. HB 133 may clarify further to what extent the bill is intended to apply to misconduct occurring off campus that is not related to school activities or school functions.

Significant Issues HB133

In 2017, 9.9% of high school students in New Mexico reported experiencing sexual violence in the last 12 months, and 11.0% reported experiencing physical dating violence in the last 12 months. 8.0% of high school students in New Mexico reported ever being physically forced to have sexual intercourse.

http://youthrisk.org/tables/?utm_source=BenchmarkEmail&utm_campaign=Aug_21_2018_Email+NMYRRS+Connections+Newsletter&utm_medium=email#/2017

HB133 requires the PED to adopt policies and procedures referencing affirmative consent in determining whether consent was granted by parties to sexual activity. Though HB133 is silent on the permissible means to convey affirmative consent (i.e. written, verbal, or nonverbal communication) it states that consent may not be granted by someone who is asleep, unconscious, incapacitated due to the influence of drugs, alcohol, or medication, or who is unable to communicate due to a mental or physical condition. HB133 also states that affirmative consent cannot be implied, assumed or inferred from silence or lack of protest or resistance, and that consent cannot be assumed from the existence of a relationship or from past sexual activity. HB133 requires that, in determining whether consent was given by parties to sexual activity, an initial statement of affirmative consent is insufficient as affirmative consent must be ongoing throughout sexual activity. It is unclear from HB133 how frequently during sexual activity that

parties to the activity would be required to receive affirmative consent from other participants.

HB133 requires the PED to adopt policies (with an affirmative consent standard) for investigations involving students, staff, volunteers and contractors both on and off campus. Investigation of and disciplinary procedures for off-campus cases involving volunteers or contractors may prove difficult for school officials, particularly if the investigations are concurrent with investigations performed by law-enforcement agencies, as school officials are unlikely to have jurisdictional authority or supervisory authority in such instances.

Per the Elementary and Secondary Education Act, reauthorized as the Every Student Succeeds Act, Section 8546 (U.S.C. 7926), each local educational agency shall have in place a policy in effect that prohibits any individual who is a school employee, contractor, or agent from assisting a school employee, contractor, or agent in obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual or agency knows, or has probable cause to believe, that such a school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law.

The Primary and Secondary Education Standards for Excellence, NMAC 6.29.1 (<http://164.64.110.134/parts/title06/06.029.0001.html>) states that districts or charter schools shall comply with subject area requirement as specified. In regards to health education as a graduation requirement, it is stated, “In ninth through twelfth grades, instruction that meets academic content and performance standards shall be provided in health education, including:

- (a) age appropriate sexual abuse and assault awareness and prevention training that meets department standards developed in consultation with the federal centers for disease control and prevention that are based on evidence-based methods that have proved to be effective.

California Senate Bill 967, signed into law in September of 2014 and commonly referred to as the “Yes means Yes Law,” is substantially similar to HB133 in that it requires post-secondary institutions to adopt policies and procedures concerning sexual assault, domestic violence, dating violence, and stalking with an affirmative consent standard. New York and Illinois have similar laws. However, HB133 also requires the PED to adopt affirmative policies and procedures with affirmative consent standards for pre-K – 12 public schools.

(https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967)

HB 133 provides that a public or private post-secondary educational institution that receives state funds for student financial assistance shall adopt certain policies and procedures described in the provision. The provisions may clarify further whether an intended remedy for non-compliance is to withhold in any manner school funds for lack of compliance.

HB 133 provides that the standard to be used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence. That is a term generally used for hearing before a trier of fact, and the provisions may clarify further what is contemplated, whether the standard is intended to be used by an investigator, entity making a determination, or something different.

HB 133 provides that a policy must include a provision addressing how appropriate protections will be provided for the privacy of individuals involved, including confidentiality. This may need to be detailed more in statute in terms of whether records collected or compiled as a result of a complaint or investigation should be withheld under Inspection of Public Records Act

("IPRA") laws or redacted under already existing provisions. This is may be more significant in light of the provisions appearing to leave it to an entity to determine how to provide appropriate protections as to privacy, which may face challenges under IPRA.

HB 133 provides that a policy must include a provision that an individual who participates as a complainant or witness in an investigation will not be subject to disciplinary sanctions for a violation of the institution's student conduct policy at or near the time of the incident, unless the institution determines that the violation was egregious. Certain examples are provided in the provisions. This may lead to an increase in complaints as the provision contains certain terms that are ambiguous, such as what precisely egregious conduct means, besides the examples provided.

HB 133 makes references to identification and location of witnesses. With the new provisions contemplating witnesses being located, it may also be important to reference the details about a compulsory process any entity has, or stated in a similar way, how witnesses will be required to appear and bring documents to any requested or required investigatory meeting.

HB 133 provides that "affirmative consent" means affirmative, conscious and voluntary agreement to engage in sexual activity. The "affirmative" could be defined as to how it is to be applied for the purposes of the new provisions to avoid possible claims that the term is ambiguous.

HB 133 provides that the department shall adopt detailed, complainant-centered policies and procedures for the investigation of and disciplinary procedures addressing allegations of sexual assault, domestic violence, dating violence and harassment or stalking involving a student, faculty member, employee, school volunteer, contractor or regent both on and off campus. Details could be clarified regarding what compulsory process the department has that is, and how will witnesses be required to appear and bring documents to any requested or required investigation. The provisions may clarify further to what extent these allegations are intended to overlap or interplay with the department's ability to investigate through other existing statutes and different legal authority permitting investigation of licensees or other individuals.

HB 133 provides that procedures shall include an initial response by the school's personnel to a report of an incident including a comprehensive follow-up complainant interview, as appropriate. It is unclear who is to make the determination of whether a particular instance is appropriate, or whether it is intended to be an independent standard to be applied, and if the latter, then in what instances it might not be appropriate in an abundance of caution.

HB 133 may further clarify whether an investigation contemplates review of any students' cell phones for text messages or images, and what compulsory process exists in that regard, and whether such compulsory process might interplay or be independent of an active law enforcement investigation.

PERFORMANCE IMPLICATIONS

None

ADMINISTRATIVE IMPLICATIONS

Administrative Implications HB133hfla

HB133hfla has no administrative implications for the PED other than those associated with HB133.

Administrative Implications HB133

The short term impact of HB133 would include policy adoption by the PED. In order for the PED to adopt policies regarding sexual assault, domestic violence, dating violence and harassment or stalking, the department would need to collaborate with other agencies such as the Children Youth and Families Department (CYFD), New Mexico State Police, the New Mexico Office of the Attorney General (NMOAG) and other agencies charged with ensuring the safety and well-being of school age youth. Adopting policies would require the PED to promulgate rule related to the policies.

HB133 requires the PED to adopt complainant-centered policies which may lead to increased reporting, and additional investigations and disciplinary procedures by school officials.

HB133 requires PED policies that provide for a comprehensive, trauma-informed training program for school officials involved in the investigating and adjudicating of sexual assault, domestic violence, dating violence and harassment or stalking cases. As such, appropriate training programs would need to be identified and made available to school officials.

Amending NMAC 6.29.1, so as to include affirmative consent in the already mandated training in health education class, would require the PED to hold public hearings, and communicate changes in the rule to district and charter schools. It would also require an amendment to course description in the Student Teacher Accountability Reporting System (STARS) to incorporate the affirmative consent requirement.

HB 133 makes references to policies and procedures needing to be adopted by the department and other entities. The provisions may further clarify what is intended by adopting policies and procedures, and whether that contemplates adopting a rule under the State Rules Act. If so, then this may require proceeding with the rulemaking process.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None as of 1/17/2019

TECHNICAL ISSUES

HB133hfla strikes “For students entering the eighth grade in the 2012-2013 school year,” on lines 2 and 3 of HB133 page 18, and replaces that language with “A”. The change creates: “A a course in health education.....” Legislators may consider striking “For students entering the eighth grade in the 2012-2013 school year, a” so as not to have “a” repeated.

OTHER SUBSTANTIVE ISSUES

None as of 1/17/2019

ALTERNATIVES

None as of 1/17/2019

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Consequences of not enacting HB133hfla:

Schools will only be required, to the extent possible, to make support services available to the accused (not the accuser) in allegations of sexual assault, domestic violence, dating violence and harassment or stalking involving a student, faculty member, employee, school volunteer,

contractor or regent both on and off campus.

Schools will be required to transition to curriculum that includes the affirmative consent standard for health education courses taught in the 2019-2020 school year, regardless of the cohort of students taking the course.

Consequences of not enacting HB133:

Public schools will continue to follow current statutes regarding investigating and reporting policies and procedures they have regarding sexual assault, domestic violence, dating violence and harassment or stalking including the reporting of student infractions and dispositions in STARS. The health education course required for graduation will continue to include age-appropriate sexual abuse and assault awareness and prevention training aligned to the New Mexico Health Education Content Standards with Benchmarks and Performance Standards.

AMENDMENTS

None